LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 13 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1310

CHARLES A. ESSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOEL MURRAY,
ROBERT J. BUTLER,
69 West Washington Street,
Chicago, Illinois 60602,
312/332-0838,
Attorneys for Petitioner.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Citation to the Opinion Below	1
Jurisdiction	2
Questions Presented	2-3
Constitutional Provision Involved	3
Statute Involved	4
Statement of the Case	4-12
Reasons for Granting the Writ	12-24
Conclusion	25
Appendix "A" (Opinion of the Court of Appeals)	
Appendix "B" (Order of the Court of Appeals Denying Rehearing and Suggestion for Rehearing in Banc)	
Appendix "C" (Indictment Involved)	

TABLE OF AUTHORITIES.

Cases.

Beard v. United States, 222 F. 2d 84 (4th Cir. 1955) . . . 15, 22

Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935) . . 20

Holland v. United States, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954) 12, 20, 21, 23, 25

Kirsch v. United States, 174 F. 2d 595 (8th Cir. 1949) . . 20, 21

Leland v. State of Oregon, 343 U. S. 790, 72 S. Ct. 1002 (1952) 20

Lilienthal's Tobacco v. United States, 97 U. S. 237, 24 L. Ed. 901 (1877) 20

United States v. Doyle, 234 F. 2d 788 (7th Cir. 1956) 22

United States v. Charles A. Esser, 520 F. 2d 213 (1975) . . . . . Appendix "A"

United States v. Fenwick, 177 F. 2d 488, 492 (7th Cir. 1949) 20

United States v. Indian Trailer Corporation, 226 F. 2d 595 (7th Cir. 1955) 20

United States v. Lacob, 416 F. 2d 756 (7th Cir. 1969) ... 18, 22

United States v. Morse, 491 F. 2d 149 (1st Cir. 1974) 13, 18, 24

United States v. Slutsky, 487 F. 2d 832 (2nd Cir. 1973) 13, 14, 15, 18, 22, 24

Universal Camera Corp. v. N. L. R. B., 340 U. S. 475, 95 L. Ed. 456, 71 S. Ct. 456 (1951) 23

Constitutional Provisions.

Amendment V, Constitution of the United States 3

Statutes.

Title 28, United States Code, Section 1254(1) 2

Title 26, United States Code, Section 7201 4

Other Authority.

Handbook for Special Agents, Intelligence Division, Internal Revenue Manual, Chapter 9900 ..... 15, 16, 17

BLEED THRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No.

CHARLES A. ESSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *United States* v. *Charles A. Esser,* Case No. 74-1997, on August 12, 1975. A Petition for Rehearing and Suggestion for Rehearing In Banc were denied by that Court on February 12, 1976.

CITATION TO THE OPINION BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit has been reported in 520 F. 2d 213 (1975) and is reproduced in Appendix "A" hereof. The Order of the United States Court of Appeals for the Seventh Circuit denying a rehearing and suggestion for rehearing in banc is unpublished and is reproduced in Appendix "B" hereof.

THROUGH POOR COPY

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit having been entered on August 12, 1975, and the Petition for Rehearing and Suggestion for Rehearing In Banc having been denied on February 12, 1976, the jurisdiction of this Honorable Court is hereby invoked under Title 28, United States Code, Section 1254(1). The instant Petition shall be filed within thirty days after February 12, 1976, in accordance with Rule 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. In a federal criminal tax evasion case prosecuted exclusively under the bank deposits theory, must the government prove, as an element of its burden of establishing the guilt of the accused, that it has conducted an adequate and full investigation, examination and analysis of defendant's bank deposits in order:

   a. to distinguish between income and non-income deposits and to thus guarantee essential accuracy in the circumstantial proof;

   b. to make every reasonable effort to obtain such documentary evidence of defendant's bank deposits, including the deposit slips and underlying items of deposit, as is necessary to distinguish between income and non-income deposits; and

   c. to afford defendant the opportunity to explain deposits which the government cannot identify as income or non-income?

2. When the government does not conduct an adequate and full investigation and analysis of defendant's bank deposits, but instead claims that it was virtually impossible to do so, is it consistent with due process under the bank deposits theory of

BLEED THRO

analysis to allow a jury which has never received any instruction from the District Court on these matters:

a. to determine whether defendant's deposits, including deposit slips and underlying items of deposit, were capable of retrieval, examination and analysis by the government; and

b. to rely upon defendant's unanalyzed monthly bank statements and savings passbooks as proof of deposits of income?

3. When the government does not conduct an adequate and full investigation and analysis of defendant's bank deposits, but instead relies solely upon defendant's monthly bank statements and savings passbooks as proof of defendant's bank deposits, is it consistent with due process under the bank deposits theory of analysis to shift the burden of proof to defendant by requiring him to explain any discrepancy between the total deposits shown on his bank statements and the income reported on his tax return or suffer the legal inference that such discrepancy is unreported income?

CONSTITUTIONAL PROVISION INVOLVED.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States is involved herein. Amendment V to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HROUGH POOR COPY

STATUTE INVOLVED.

The statute under which petitioner was charged and convicted is Title 26, United States Code, Section 7201. Said statute provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851.)

STATEMENT OF THE CASE.

The case was commenced on November 30, 1973, with the filing of a three-count indictment in the United States District Court for the Northern District of Illinois, Eastern Division, charging the petitioner with willfully and knowingly attempting to evade income taxes due for the years 1967, 1968 and 1969, by filing false income tax returns, in violation of Title 26, United States Code, Section 7201. The indictment involved is reproduced in Appendix "C" hereof. Petitioner was tried by a jury and convicted on all counts. His conviction was affirmed by the United States Court of Appeals for the Seventh Circuit.

Petitioner was prosecuted exclusively under the bank deposits theory of analysis. Throughout the trial and appeal petitioner argued that the government was required but had failed to prove, as an element of its burden of establishing his guilt, that it had conducted an adequate and full investigation, examination and analysis of petitioner's bank deposits. Petitioner contended that the government had failed to make any reasonable effort to examine, analyze and introduce into evidence petitioner's deposit slips and underlying items of deposit. Petitioner argued that the government had thus failed to properly attempt to dis-

BLEED THROUG

tinguish income from non-income deposits and had thus failed to accord petitioner any opportunity to explain his unidentified non-income deposits. Petitioner concluded that these cumulative failures on the part of the government denied him a fair trial.

The government claimed at trial and on appeal, notwithstanding substantial evidence to the contrary, that it was virtually impossible to examine, analyze, reproduce and introduce into evidence petitioner's bank deposits. The government, therefore, merely obtained from petitioner, and introduced into evidence, his monthly bank statements and savings passbooks, without making any attempt to ascertain whether the deposits were income or non-income. The government's actual analysis of the *deposits* to petitioner's bank accounts consisted of simply adding up the credits on his monthly bank statements and savings passbooks. (Appendix, page A6, footnote 2.)

The government also contended on appeal that its investigation of petitioner's deposits was legally sufficient because petitioner had stated to the Internal Revenue Service that he deposited his business receipts into his bank accounts and because the monthly bank statements from his business checking account showed regular deposits having the appearance of business receipts. Contrary to this contention, however, the record is clear that petitioner *never* told the Internal Revenue Service that he *only* deposited business receipts into his bank accounts. It is clear from the record that during the years in question petitioner, a self-employed veterinarian, maintained only one active checking account which was titled, Prospect Animal Hospital, and that he used that account for non-business as well as business purposes.

Petitioner argued that the "appearance of income" rationale urged by the government was inapposite and could not legally suffice as a substitute for the fundamental requirement that in a bank deposits case an adequate and full investigation of the de-

OUGH POOR COPY

posits must be conducted in order to distinguish between income and non-income deposits, in order to afford the accused an opportunity to explain deposits which the government cannot identify as income or non-income, and in order to guarantee essential accuracy in the circumstantial proof.

The Court of Appeals decided that the government's claim that it was virtually impossible to retrieve, examine and analyze petitioner's deposits was a question of fact for the jury. Although the Court recognized that "deposit slips and underlying items of deposit are customarily introduced to demonstrate the nature of the deposits" (Appendix, page A5), it concluded, based upon petitioner's statement that he deposited business receipts into his bank accounts, that the "bank statements introduced into evidence . . . showed regular deposits having the appearance of business receipts." (Appendix, page A7). The Court held that the authorities do not require the government to identify and analyze a defendant's bank deposits in order to prosecute under the bank deposits theory. The government must only prove that a defendant "was engaged in an income producing business and that regular deposits of funds having the appearance of income were in fact made to bank accounts during the course of business." (Appendix, page A5.) Once the government proves deposits having the appearance of income, "defendant has the burden to explain as far as possible the deposits. With this done the jury is entitled to infer that the difference between the balance of deposited items and reported income constitutes unreported income." (Appendix, page A6.)

The Court of Appeals concluded that a "full investigation of various transactions underlying defendant's deposits was conducted and that all reasonable steps were taken to identify and deduct non-income items such as inter-bank transfers and repayment of loans." (Appendix, pages A6-A7.) The Court also stated that the record was "replete with testimony regarding the determination and crediting of non-income items to the total deposits." (Appendix, page A7.) The trial record belies

BLEED THROUG

these conclusions. The few non-income items which the government identified and deducted were not discovered by a full investigation and analysis of the transactions underlying petitioner's deposits, but were readily determined in the following cursory manner.

The government observed from the face of the savings passbooks which petitioner demonstrated to the IRS agents, that in 1967 at one savings and loan association petitioner effectuated four intra-bank transactions: a transfer of $1046.18 from one account to another, a transfer of $15,000 from a regular savings account to a savings certificate account, a renewal of said $15,000 savings certificate account, and a transfer of $5186.40 from a savings account which petitioner closed to another savings account. (Tr. 269-272.) The government deducted these intra-bank transfers as non-income.

The government was told by petitioner that he held two mortgages and that he received monthly payments which he deposited to his bank accounts. Petitioner also supplied the government with the names of the mortgagors and the government contacted them to confirm the existence of the mortgages. Without analyzing petitioner's deposits, the government deducted these mortgage loan repayments as non-income. (Tr. 571-573.)

The government determined from the face of petitioner's income tax returns that petitioner received non-business income, including proceeds from the sale of stock and commodities, rents, royalties, dividends and interest. Without analyzing petitioner's deposits, the government deducted these items as non-income.

The record is replete with testimony regarding the government's total failure to investigate and analyze petitioner's bank deposits. It is impossible to determine how many other non-income items could have been eliminated had the government actually analyzed the bank deposits.

The following facts, supported by transcript citations, bear importantly on the questions presented herein. Although the key government witnesses, the special agent who conducted the

OUGH POOR COPY

criminal investigation and the revenue agent who testified as the government's summary witness, both knew that the bank deposits theory requires an analysis of the deposits (Tr. 232, 498), neither ever attempted to analyze the deposits made to petitioner's bank accounts. (Tr. 230-232, 499.) The special agent admitted that he did not even *attempt* to reproduce bank microfilm records of petitioner's deposits. (Tr. 213.) He admitted that the microfilm records of the bank where petitioner maintained his only active checking account were available (Tr. 230), but the deposit tickets "could not be produced without going into a time-consuming operation" (Tr. 229) and *he was told* that it would be virtually impossible. (Tr. 229.) Although he admitted that the deposits themselves, including the deposit slips and the underlying items of deposit, are the primary method of proof in a deposits case (Tr. 232), he testified that during his more than two-year investigation of petitioner the only things he investigated were the records furnished him by petitioner. (Tr. 231.)

The assistant cashier of the bank where petitioner maintained his only active checking account testified that the bank maintains a microfilm record of deposits and that the record is available. (Tr. 253.) He testified that his bank was not asked, and did not attempt, to locate any individual deposits to petitioner's account for any of the three years in question. (Tr. 256.) He admitted that, though it might be a tedious job, the vast majority of the deposits could be reconstructed from the microfilm. (Tr. 256-257.)

The president of a savings and loan association, where petitioner maintained a savings account, testified that the original source of the funds deposited to petitioner's account could have been ascertained by locating the deposit items on the microfilm records of his association; however, the government did not ask him to do that. (Tr. 283-284.)

After the trial commenced, the attorney for the government instructed three IRS special agents to examine microfilm records

BLEED THROUGH

at the bank where petitioner maintained his checking account (Tr. 395, 432, 449) and to obtain five designated deposit tickets and the corresponding checks deposited to petitioner's checking account. The first special agent testified that he attempted to locate the deposit tickets and checks on two dates in 1967 (Tr. 395-396) and he was able to obtain one deposit ticket and between 220 and 240 checks comprising the majority of the deposit made on that date. (Tr. 399-400.) He could not find the second deposit but admitted that it was not posted on petitioner's monthly bank statement on the same line as the date of the deposit he had attempted to locate. (Tr. 411-412.) The second agent testified that he had attempted to locate the deposit tickets and checks on two dates in 1968 (Tr. 432-433) and he was able to obtain one deposit ticket and 79 checks comprising a majority of the deposits made on that date. He could not find the second deposit but admitted that it was not posted on petitioner's monthly bank statement on the same line as the date of the deposit he had attempted to locate. (Tr. 441.) The third agent testified that he attempted to locate a deposit ticket and checks on one date in 1969 and he was unable to find a deposit ticket for that date but he did locate 48 checks deposited to petitioner's account on that date. (Tr. 449-452.)

Evidence adduced at trial from both government and defense witnesses established that during the years in question petitioner had a substantial cash accumulation from which he made substantial cash gifts and loans to relatives (Tr. 368-376, 760-763), friends (Tr. 310-317, 826-831) and business acquaintances. (Tr. 815-821.) These gifts, loans and the repayment of same are summarized as follows:

POOR COPY

PAGES FOUND VERTICALLY

BLEED THROUGH

Witness	Transcript	Type	Gifts and Loans 1966	1967	1968	1969	Repayments 1967	1968	1969
Patricia Blosser	312-313	L	$5,000						
	313	R					$ 5,000 (A)		
	313-314	L		$ 6,000					
	313-314	R					6,000 (B)		
	315-316	L		3,000					
	315-316	R					3,000 (B)		
	316-317	L		5,000					
	316-317	R					5,000 (B)		
Emily Jacobson	368-369	G			$50,000				
	375	R							$ 5,000 (B)
	375	G			7,000				
	376	R						7,000 (B)	
Yvonne Koester	760	L			23,000				
	763	R*						1,400*(B)	1,680*(B)
Wendell Sampson	817	L		17,000					
	818	R					17,000 (B)		
	819	L		4,500					
	819	R						4,500 (B)	
Freda Kucera	826-827	L			$ 6,000				
	828	R						6,000 (B)	
	829-830	L			15,000				
	829-830	R						15,000 (B)	
	830-831	L				$6,000			
	830-831	R							6,000 (B)
			5,000	$35,000	$101,000	$6,000	$36,000	$33,900	$12,680

Type: L—Loan G—Gift R—Repayment

*Loan Repayment at $140 per month
10 months in 1968 $140x10=$1,400
12 months in 1969 $140x12=$1,680

(A) Loan repayment credited to petitioner in government summary chart as non-income deposit

(B) Loan repayments *not* credited to petitioner as non-income deposits

Concerning the foregoing gifts, loans and repayments, the government's summary witness testified that he credited petitioner with a non-income loan repayment of $5,000 from Patricia Blosser in January, 1967, because he assumed that "those funds may have been redeposited to the accounts. . . ." (Tr. 572.) He testified, however, that he treated Blosser's testimony about other cash loans she received from, and repaid to, petitioner in 1967 differently. (Tr. 573.) He stated that he had no way of knowing the source of these loans (Tr. 573), but "the money . . . could have come from Dr. Esser's cash accumulation. . . ." (Tr. 573.) He admitted that all funds accumulated by petitioner prior to 1967 and deposited in his bank accounts in 1967, 1968 or 1969 would not be taxable income during the years in question (Tr. 642-643), but the government's summary would have treated such amounts as taxable income. (Tr. 643.)

The government's summary of the evidence presented during its case-in-chief admittedly did not credit petitioner with additional non-income loan repayments totalling $14,000 from Blosser in 1967 (Tr. 655), $7,000 in non-income gift repayments from Emily Jacobson in 1968 (Tr. 656-658), and $5,000 in non-income repayments from her in 1969. (Tr. 659-660.) The government did not re-summarize the evidence at the close of the defense case and, accordingly, did not credit petitioner with additional non-income loan repayments totalling $17,000 from Wendell Sampson in 1967 (Tr. 818), $4,500 from Sampson in 1968 (Tr. 819), $21,000 from Freda Kucera in 1968 (Tr. 828-830), $1,400 from Yvonne Koester in 1968 (Tr. 763), $6,000 from Kucera in 1969 (Tr. 830-831), and $1,680 from Koester in 1969. (Tr. 763.)

Petitioner's business manager testified that most of petitioner's clients *paid by check* as opposed to cash. (Tr. 754.) She testified that several times a day petitioner cashed checks for his clients from funds he had in his wallet. (Tr. 755.) Petitioner cashed employees' payroll checks (Tr. 757) and travelers' checks (Tr. 759-760) in the same manner. (Tr. 757.) All such

POOR COPY

checks were then put in the cash box (Tr. 756) and became part of petitioner's bank deposits. (Tr. 757.) Several times a week petitioner also gave her an additional hundred or two hundred dollars from his wallet and told her to put it in with the deposit. (Tr. 757-758.) She never saw petitioner cash a check from the cash business receipts in the cash box. (Tr. 756.) The government's summary witness had previously testified that all client checks, employee payroll checks and travelers' checks cashed by petitioner and subsequently deposited to his bank accounts would have appeared in the government's summary as taxable income to petitioner. (Tr. 622-637.)

Notwithstanding all of the foregoing, the Court of Appeals determined that "the evidence was more than sufficient to support the verdict below." (Appendix, page A7.)

REASONS FOR GRANTING THE WRIT.

The requirement that in a bank deposits case the government prove, as an element of its burden of establishing the guilt of the defendant, that it has made an adequate and full investigation of the deposits to defendant's bank accounts emanates from the decision of this Honorable Court in *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954). Although *Holland* was prosecuted under the net worth theory, the bank deposits theory is fraught with similar dangers for the accused. As Mr. Justice Clark recognized in 348 U. S. at 127-128:

> There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows.

In a bank deposits case there exists the similar danger that the jury might erroneously assume that once the government establishes a discrepancy between defendant's total bank deposits and reported income, the crime of tax evasion has been proved.

BLEED THROU

To alleviate this peril several of the circuits have defined the proof which the government must adduce in a criminal case prosecuted exclusively under the bank deposits theory.

The requirements for proceeding under the bank deposits theory were recently reviewed in *United States* v. *Morse*, 491 F 2d 149 (1st Cir. 1974), in which the Court stated at page 152:

> In order to legitimately avail itself of this approach, the government must initially introduce evidence to show (1) that, during the tax years in question, the taxpayer was engaged in an income producing business or calling; (2) that he made regular deposits of funds into bank accounts; and (3) *that an adequate and full investigation of those accounts was conducted in order to distinguish between income and non-income deposits.* (Emphasis added.)

The investigatory procedures italicized above have also been mandated in other circuits. In *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973), the Court stated at page 840:

> The requirement of a full and adequate investigation in a bank deposits case is based on the similar requirement in a net worth case. *Holland* v. *United States, supra.* Such investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the government's burden of proving guilt beyond reasonable doubt.

The Court then proceeded to extensively examine the adequacy of the government's investigation and analysis of *Slutsky's* deposits. Because the analysis in *Slutsky* is in such sharp contrast with the absence of any analysis in the case at bar, the bank deposits analysis in *Slutsky* merits detailed scrutiny. With respect to each of *Slutsky's* six bank accounts, hereinafter numbered 1 through 6, the Court stated in 487 F. 2d at 840-841:

> 1. With the exception of two unidentified items totalling some $2,000, every item of the total $1,661,639.08 deposited in this account during the three taxable years was analyzed. More than $1.5 million was identified as non-income. The remainder was charged as income.

ROUGH POOR COPY

2. Of the total $1,710,083.34 deposited in this account, more than $550,000 was identified as income. . . . That figure comprised 788 individual items of which 678 were items under $1,000. The IRS' investigation of this account entailed an analysis of every item over $1,000 (with the exception of approximately $11,000), and a random analysis of items under $1,000. Only $13,456.78 of the total deposits was identified and eliminated as non-income.

3. In this, the major business account, more than $13 million was deposited during the three years in question. Of the items over $1,000, the IRS analyzed all but $4,000. In addition, of the items under $1,000 (all of which had a number encircled on the back of the checks), some 769 were randomly analyzed. The result was the elimination of almost $3.8 million as non-income, the identification of over $800,000 as income, and the further charging as income of almost $7.5 million in unidentified items under $1,000. Some $1 million in currency deposited in this account was also charged as income.

4. Of the total $996,297.82 deposited in this account, every item was identified. $19,500 was eliminated as non-income. The remainder was charged as income.

5. Of the total $326,687.75 deposited in this account, every item was identified. More than $230,000 was eliminated as non-income. The remainder was charged as income.

6. Of the total $360,929.44 deposited in this account, every item was identified. More than $170,000 was eliminated as non-income. The remainder was charged as income.

In response to *Slutsky's* complaint that the government did not analyze every deposit item under $1,000, the Court concluded in 487 F. 2d at 842:

> [T]he investigation included a detailed check of every item in an amount greater than $1,000, with very few specified exceptions. In addition, a random check of 1447 items in amounts less than $1,000 was made; and the analyzed items were found to constitute income in virtually every

BLEED THROUGH

> instance. Moreover, a further examination of the business accounts disclosed that almost every item in an amount under $1,000 was reflected by a check with a room number encircled on the back; according to the record, this specifically identified these items as guest receipts and therefore income. To hold the government to a stricter duty of investigation than it performed here would be to ignore both the "reasonableness" and "fairness" strictures that have been imposed; it would also result in an exercise in diminishing returns in terms both of the provision of relevant information to the fact-finder and of the protection of the rights of taxpayers.

In *Beard* v. *United States,* 222 F. 2d 84 (4th Cir. 1955), the government's extensive analysis of defendant's bank deposits was described at page 91:

> The evidence was offered in the following manner: Microfilm copies of the checks made by the Bank by the Recordak process in the usual course of business. . . . They comprised 950 reels of microfilm, each containing reproductions in miniature of approximately 1500 checks. From the microfilm the Government made enlarged photographs of 854 checks cashed or deposited in 1944 . . . by Beard or his wife, and bearing the signature of one or the other as last endorser. These items were listed on a 19 page document which contained as to each check the date, the bank on which it was drawn, the drawer, the payee and the amount; and it also contained figures by which it could be identified as one of the items in the microfilm. It was prepared by ten revenue agents. . . .

In obvious recognition of the legal requirement that an adequate and full investigation of the deposits must be made in order for the government to prosecute under the bank deposits theory, the *Handbook for Special Agents, Intelligence Division, Internal Revenue Manual,* Chapter 9900, published by the Internal Revenue Service, promulgates the investigative requisites for a bank deposits case in section 326.4(2):

> The Government must establish that the deposits reflect income which is current. This may be accomplished by

OUGH POOR COPY

> showing that the taxpayer was engaged in an income-producing business, that he made periodic deposits to his bank account, *that the deposits have been analyzed to eliminate nonincome items such as loans or gifts, and income items which may be duplications of amounts actually accounted for and reported or, amounts which have been earned in prior years.* (Emphasis added.)

Section 326.6(4) is even more cogent:

> *The analysis of deposits is the vital part of a bank deposits case and too much importance cannot be placed upon its accuracy.* Exhibit 300-6 is illustrative of a schedule which may be used to show the results of this analysis. (Emphasis added.)

Exhibit 300-6, hereinafter reproduced, conclusively demonstrates that a deposits case contemplates a day-by-day analysis of every deposit in order to exclude non-income items and attempt to identify the source of the deposit items.

BLEED THROUG

POOR COPY

PAGES FOUND VERTICALLY

EXHIBIT 300-6

Handbook Reference: Subsection 326.6

ANALYSIS OF DEPOSITS TO CHECKING ACCOUNT

John and Mary Roe
First National Bank of Dayton, Ohio

Date	Total Deposit	Gross Receipts Deposited			Loans, Transfers, etc.	Report Exhibit No.	Source
		Currency	Checks				
			Identified	Unidentified			
1967							
1-3	$ 2,400	$ 100					Unidentified
					$ 1,600	6	Loan—Doc's Market
			$ 500			7	Sale to Elk's Club
			$ 100			8	Sale to John Smith
				$ 100			Unidentified
1-4	$ 1,200	$ 400					Unidentified
			$ 800			9	Sale to Frank Lee
1-5	$ 10,500	$ 200					Unidentified
					$10,000	10	Inheritance
			$ 300			11	Sale to John Smith
1-6	$ 3,750				$ 3,750	12	U. S. Savings Bonds Redeemed
Bal. of Year	$145,165	$40,300	$72,300	$28,765	$ 3,800		
Total	$163,015	$41,000	$74,000	$28,865	$19,150		

In the instant case, *United States* v. *Esser*, 520 F. 2d 213 (1975), the Seventh Circuit indicated its reliance upon *United States* v. *Morse*, 491 F. 2d 149 (1st Cir. 1974), and *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973) (Appendix, page A5), but utterly disregarded or eliminated the third foundation requirement delineated by the First Circuit in *Morse* and followed by the Second Circuit in *Slutsky:*

> that an adequate and full investigation of those accounts was conducted in order to distinguish between income and non-income deposits. 491 F. 2d at 152.

Instead of requiring the government to fully investigate and analyze petitioner's bank deposits in order to distinguish between income and non-income deposits, the Seventh Circuit allowed the jury, which had never received any instruction from the District Court on this matter, to determine whether the government was or was not capable of retrieving and analyzing defendant's deposits. The Court stated in 520 F. 2d at 216-217 (Appendix, page A5):

> The government introduced the bank statements and passbooks as the most reliable evidence available. Though appellant attempted on cross-examination to establish that the slips and items were capable of retrieval, the question was left as one of fact for the jury.

The Seventh Circuit then ruled that a prosecution under the bank deposits theory does not require an analysis of the bank deposit items. The Court stated in 520 F. 2d at 217 (Appendix, page A5):

> [T]he bank deposits theory requires the government to prove that the defendant was engaged in an income producing business and that regular deposits of funds having the appearance of income were in fact made to bank accounts during the course of business. *United States* v. *Lacob*, 416 F. 2d 756 (7th Cir. 1969); *United States* v. *Stein*, 437 F.2d 775 (7th Cir. 1971); *United States* v. *Morse*, 491 F.2d 149 (1st Cir. 1974). The total deposits figure serves as the starting point for further analysis of the taxpayer's accounts.
>
> * * * * *

BLEED THROU

> After the government proves that deposits having the appearance of income were made the defendant has the burden to explain as far as possible the deposits. With this done the jury is entitled to infer that the difference between the balance of deposited items and reported income constitutes unreported income.

It is clear from the *Esser* opinion that the jury was free to rely upon the unanalyzed monthly bank statements and savings passbooks as proof of deposits of income, so long as the petitioner was engaged in an income producing business and that regular deposits, having the appearance of income, were made to his bank accounts. The Seventh Circuit then shifts the burden to petitioner to explain his deposits by attempting to distinguish income from non-income deposits from literally hundreds of unanalyzed entries in the deposits column on his monthly bank statements and savings passbooks which, at the time of trial, are five, six and seven years old. The petitioner thus had the burden of attempting to prove his innocence by doing exactly what the government claimed it could not, and therefore did not, do: conduct an investigation and analysis of his bank deposits, including his deposit tickets and clearing checks which exist only on the microfilm records at his banks, in order to distinguish between income and non-income deposits. If the petitioner fails to meet this burden, the Seventh Circuit indulges the inference that the discrepancy between the total deposits shown on the bank statements and the income reported on his tax returns is unreported income.

Petitioner respectfully suggests that the Seventh Circuit seriously misinterpreted the law and effectively deprived him of due process, first, by disregarding or eliminating the legal requirement that in a bank deposits case the government must prove, as an element of its burden of establishing the guilt of the defendant, that it has made an adequate and full investigation of the deposits to defendant's bank accounts; second, by shifting the burden of proof from the government to the defendant; and

ROUGH POOR COPY

third, by indulging the legal inference that if the defendant fails to explain the discrepancy between the total deposits shown on his monthly bank statements and his reported income, the difference is unreported income. While these errors of law are individually significant, their cumulative effect demonstrates an extraordinary deprivation of the fundamental fairness guaranteed a defendant in a criminal case.

It is elemental that the law never imposes a higher burden on a defendant in a criminal case than the burden of proof imposed upon the government. The burden of proof in a criminal case never shifts. *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 24 L. Ed 901 (1877); *Leland* v. *State of Oregon,* 343 U. S. 790, 72 S. Ct. 1002 (1952); *United States* v. *Fenwick,* 177 F. 2d 488, 492 (7th Cir. 1949); and *United States* v. *Indian Trailer Corporation,* 226 F. 2d 595, 598 (7th Cir. 1955). Accordingly, the conclusion seems inescapable that when the government proceeds exclusively under the bank deposits theory but does not analyze defendant's bank deposits, the law cannot constitutionally impose upon defendant the burden of explaining his deposits or, failing to do so, suffer the inference that the difference between the total of the items in the deposits column on his monthly bank statements and his reported income is unreported income. The bare fact that a man has deposited sums of money in a bank does not prove that he owed income tax on those amounts. *Kirsch* v. *United States,* 174 F. 2d 595, 601 (8th Cir. 1949); and *Gleckman* v. *United States,* 80 F. 2d 394, 399 (8th Cir. 1935).

The *Esser* rationale represents a significant transgression from Mr. Justice Clark's reasoning in *Holland* v. *United States, supra,* in 348 U. S. at 126:

> One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assump-

BLEED THROUG

> tion raises serious legal problems in the administration of the criminal law. Unlike civil actions . . . the prosecution must always prove the criminal charge beyond a reasonable doubt.

And in 348 U. S. at 128:

> Although it may sound fair to say that the taxpayer can explain the "bulge" in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, *such a rule would tend to shift the burden of proof*. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger. (Emphasis added.)

The Seventh Circuit's reasoning in the instant case is also inconsonant with *Kirsch* v. *United States*, 174 F. 2d 595 (8th Cir. 1949). Although in *Kirsch* the government introduced into evidence the bank's record of defendant's business checking account and deposit slips showing all deposits made to that account, the Court reversed the conviction after finding that the government had not sufficiently *analyzed* defendant's bank deposits. The Eight Circuit held in 174 F. 2d at 601:

> It is one thing for a party to say . . . that he had exercised all of the means he reasonably could to determine how much of a bank account was income, had eliminated all that he could determine was not income, and was therefore assuming for the purpose of calculating taxes due that the remainder was income, and quite another and different thing to say . . . as was done in this case—My evidence shows that all of these deposits were not income, but I do not know how much was not, I have made no effort to find out. So I am assuming that all are income and am casting the burden on the defendant to show, if he can, how much is not, or suffer the consequences. The latter procedure cannot be approved.

OUGH POOR COPY

The Seventh Circuit's decision in the case at bar represents the first bank deposits prosecution in which an appellate court has approved the fundamental failure of the government to conduct any investigation and analysis of the deposits. It also appears to be the first time that the government was permitted to prove defendant's deposits by merely utilizing the figures shown on defendant's monthly bank statements and savings passbooks. Although the government identified and eliminated several obvious non-income items from the face of the passbooks, it is impossible to determine how many non-income items could have been eliminated from defendant's deposits had the government conducted the type of bank deposits investigation prescribed in the Internal Revenue Manual and performed in *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973) and in *Beard* v. *United States*, 222 F. 2d 84 (4th Cir. 1955). As the First Circuit said in *Morse, supra*, 491 F. 2d at 154:

> The significance of the agent's allowing a non-income deduction is not the concession, but the corresponding implication that it should not be larger.

The record in the instant case contains numerous examples of loan repayments which were not credited to defendant as non-income items, and there is considerable testimony concerning the defendant's practice of cashing clients' checks, travelers' checks and employee payroll checks, all of which were deposited to petitioner's bank account. Since the government did not analyze the deposits, all of these items were considered taxable deposits of income.

The instant case is not only in conflict with the decisions of other circuits, it is actually a departure from the doctrine heretofore followed in the Seventh Circuit. In *United States* v. *Doyle*, 234 F. 2d 788 (7th Cir. 1956), the Court approved the use of the bank deposits method "if a thorough investigating analysis of the deposits is made as . . . is generally required." 234 F. 2d at 793. Now the Seventh Circuit, apparently by relying upon *United States* v. *Lacob*, 416 F. 2d 756 (7th Cir.

BLEED THROUGH

1969), has improperly adopted the "appearance of income" concept as a substitute for the requirement of an analysis of the deposits. *Lacob*, however, envisioned no such substitution. *After* defendant's bank deposits were analyzed in *Lacob*, the government identified over $55,000 as income and an additional $39,000 as having the appearance of income. The Court in *Lacob* found that "almost two-thirds of the income charged to defendant was, in fact, proved by the specific-item method." 416 F. 2d at 760. A thorough investigative analysis of the bank deposits thus remained a prerequisite to proof or receipts having the appearance of income.

Legal issues of exceptional importance have been raised in the instant petition and extraordinary circumstances exist which require an authoritative consideration and decision by this Honorable Court. In *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954), Mr. Justice Clark in 348 U. S. at 129 wrote:

> [P]itfalls inherent in the net worth method . . . require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. *Universal Camera Corp.* v. *N.L.R.B.* 340 U.S. 474, 489, 95 L.Ed 456, 468, 71 S.Ct. 456. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.
>
> * * * * *
>
> Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

Petitioner respectfully suggests that in the case at bar the United States Court of Appeals for the Seventh Circuit did not exercise that "great care and restraint" that has been mandated by this Honorable Court. By abandoning the requirement for an adequate and full investigation and analysis of a defendant's

POOR COPY

bank deposits in a case prosecuted exclusively under the bank deposits method, the Seventh Circuit rescinded the guarantee of essential accuracy in the circumstantial proof and transgressed from the rationale and the rules promulgated in *Holland*. The rules of law enunciated by the Seventh Circuit which:

1. permit the jury, without instructions, to determine whether defendant's deposits were capable of retrieval and analysis by the government,
2. permit the jury, without intructions, to rely upon defendant's unanalyzed monthly bank statements and savings passbooks as proof of deposits of income,
3. shift the burden of proof to defendant by requiring him to explain any discrepancy between the total deposits shown on his bank statements and the income reported on his tax return or suffer the legal inference that such discrepancy is unreported income, and
4. adopt the "appearance of income" rationale,

also violate *Holland* and, moreover, fail to comport with due process, fundamental fairness, or a sense of justice. These issues cogently warrant resolution by this Honorable Court.

All of the foregoing issues, particularly the departure from the requirement that the government must prove, as an element of its burden of establishing the guilt of the accused, that it has conducted an adequate and full investigation and analysis of defendant's bank deposits, places the Seventh Circuit in conflict with recent decisions from two other circuits: *United States* v. *Morse*, 491 F. 2d 149, 152 (1st Cir. 1974), and *United States* v. *Slutsky*, 487 F. 2d 832 (2nd Cir. 1973). This conflict in the circuits, being directed at the fundamental due process requirements for proceeding under the bank deposits method, merits resolution by this Honorable Court. It is time for the principles of *Holland* v. *United States, supra*, to be reaffirmed.

BLEED THROUGH

CONCLUSION.

For the reasons stated herein, petitioner respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOEL MURRAY,
ROBERT J. BUTLER,
69 West Washington Street,
Chicago, Illinois 60602,
312/332-0838,
Attorneys for Petitioner.

POOR COPY